INDEX

CITATIONS

733276—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1080

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

v.

CHRISTINE COLLINS, ET AL.

No. 1081

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

v.

ADOLPH HIRSCH

No. 1082

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, PETITIONER

v.

WILLIAM M. MORRISON, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

The Acting Solicitor General, on behalf of Philip B. Fleming, Temporary Controls Administrator, Office of Temporary Controls, petitioner herein, prays that writs of certiorari issue to

review the judgments of the United States Emergency Court of Appeals, entered in the above-entitled cases on January 2, 1947.

OPINION BELOW

The original opinion of the United States Emergency Court of Appeals (R 310–320) and its opinion on the petition for rehearing (R. 340–341) have not yet been reported.

JURISDICTION

The judgments of the United States Emergency Court of Appeals were entered on January 2, 1947 (R. 328–329), and on January 30, 1947, the Administrator's petition for rehearing was denied (R. 341). The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Where a regulation established maximum prices for sales of a commodity in other than dollars-and-cents terms and required sellers in certain cases to apply to the Administrator for orders prescribing the method by which such established maximum prices are to be determined in dollars-and-cents terms, may the Administrator, in the event a seller has failed to make application as required by the regulation, issue such an order covering sales which have already been made, after

the Administrator has filed a treble-damage suit in the United States District Court charging that such sales were made in violation of the regulation?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended (hereinafter sometimes termed the Act) and of the applicable maximum price regulations involved, are set forth in the Appendix, *infra*, pp. 20–38.

STATEMENT

The respondents are all former stockholders of the Cummins Distilleries Corporation (R. 2, 19, 33) which was engaged from 1933 until December 1942, in the business of selling whiskey in bulk and in cases (R. 61). During the month of December 1942, the Corporation divested itself of its assets and was dissolved (R. 76–120). Warehouse receipts covering approximately 51,000 barrels of bulk whiskey were distributed by the Corporation to a "stockholders distribution committee." (R. 147, 321.) Between the dates of January 4 and 9, 1943, the committee, on behalf of the stockholders, sold the warehouse receipts at the best prices obtainable (R. 12, 21, 33, 45, 46, 61, 64), on the alleged assumption that such sales were not subject to price control.[1] (R. 3, 22, 34–35.)

[1] The court below held that Maximum Price Regulation 193 was applicable to the sales of the warehouse receipts made by the respondents during January 1943, that such sales were

On May 27, 1943, the Administrator, for and on behalf of the United States, instituted a treble-damage suit under Section 205 (e) of the Act in the United States District Court for the Western District of Kentucky charging the Cummins Distilleries Corporation, its officers and directors, its stockholders' distribution committee, the respondents herein as individuals, and others with having made overceiling sales (R. 12–13, 22–23, 46–47). This litigation is still pending (R. 59–120).

At the time the sales in question were made, Maximum Price Regulation 193 (hereinafter sometimes termed "MPR 193") set forth three rules under which maximum prices for domestic distilled spirits were to be determined.[2] These were as follows:

Rule 1.—Section 1420.13 (a) of MPR 193, *infra,* pp. 29–31, provided that the seller's maximum price should be his maximum price established under Section 1499.2 (a) of the General Maxi-

---

sales of bulk whiskey at wholesale covered by that regulation, and that the regulation was valid as applied to such sales. These determinations by the court below are not in issue in this proceeding. The Court also reached the same result in *Collins, et al.* v. *Fleming*, No. 371 (ECA Jan. 2, 1947), in which case the respondents in No. 352, now before this Court, were the complainants. The judgment in No. 371 has become final. See also *Brown* v. *Cummins Distilleries Corp. et al.*, 53 F. Supp. 659 (W. D. Ky.) (R. 160–165).

[2] Bulk whiskey was first brought under price control by the General Maximum Price Regulation (R. 194). MPR 193 superseded the General Maximum Price Regulation when it became effective on August 5, 1942 (R. 194).

mum Price Regulation (hereinafter sometimes termed "the GMPR"), plus certain specified additions not here relevant. The applicable section of the GMPR provided that the seller's maximum price should be the highest price charged by him during March 1942 for the same or similar commodity.

Rule 2.—Section 1420.13 (b) of MPR 193, *infra,* pp. 31–32, provided that if a seller could not determine his maximum price under Section 1420.13 (a), his maximum price should be the maximum price established under Section 1420.13 (a) for his most closely competitive seller.

Rule 3.—Finally, Section 1420.13 (c) of MPR 193, *infra,* p. 32, provided that if a seller could not determine his maximum price under either Section 1420.13 (a) or Section 1420.13 (b),[3] his maximum price should be determined in accordance with Section 1499.3 of the GMPR. Section 1499.3 of the GMPR, *infra,* pp. 35–38, at the time respondents made the sales in question, provided that each seller's maximum price "shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation."[4] It provided further that

[3] Hereinafter in this petition subsections (a), (b), and (c) of Section 1420.13 of MPR 193 will be designated as Rules 1, 2, and 3, respectively.

[4] Since Section 1499.3 of the GMPR was incorporated by reference into MPR 193, this provision for present purposes must be read as referring to the level of maximum prices established by MPR 193, and the court below so indicated (R. 318).

"such price shall be determined by the seller in accordance with the following procedures." The procedures which followed were set forth in the four subparagraphs of that Section. Subparagraph (c), *infra*, p. 37,[8] provided that in the case of a sale at wholesale the maximum price should be a price determined by the seller after specific authorization from the Office of Price Administration given "in the form of an order prescribing a method of determining the maximum price." A seller seeking such authorization was required to file an application for such an order.

In the treble-damage suit against respondents, the Administrator proceeded initially on the theory that respondents' maximum prices were governed by Rule 2, *supra*, p. 5, that is, by reference to the maximum prices of their most closely competitive sellers (R. 187, 313). In the course of the proceeding, respondents took the position that they had no closely competitive sellers whose maximum prices they could use as a reference. If respondents were correct in this, and if Rule 1, *supra*, pp. 4–5, did not apply because respondents had made no sales of bulk whiskey in March 1942, it would be necessary to apply Rule 3, *supra*, p. 5, to the sales made by respondents in January, 1943, since MPR 193 covered the sales in question. Respondents had not, however, made application to the

[8] It is undisputed that the other three subparagraphs have no application to this case.

Administrator under Rule 3 for an order prescribing a method of determining their maximum prices, as required by the regulation. The Administrator thereupon gave respondents an opportunity to file the requisite application under Rule 3 (R. 16, 27–28). Respondents rejected this opportunity, reiterating their position that the sales in question were not subject to any price control (R. 17–18, 29). Consequently, on June 13, 1945, the Administrator on his own initiative issued Order 45, *infra*, pp. 38–40, pursuant to Rule 3.

That Order provided that respondents' maximum prices for the sales in question were the maximum prices established in accordance with Rule 1 or Rule 2, but that in the event those Rules were found to be inapplicable, the dollars-and-cents maximum prices should be determined in accordance with a prescribed method designed to yield dollars-and-cents prices in line with the level of maximum prices established for bulk whiskey by MPR 193 (R. 185).[6] In the protest proceedings be-

[6] Order 45 provided that the specific dollars and cents maximum prices applicable should be those set forth in Section 1420.13 (g) of MPR 193, adjusted in accordance with the age of the whiskey sold (R. 185). That section had been added to MPR 193 by Amendment 4 to that regulation on February 3, 1943 (8 F. R. 1632). It specified as dollars and cents maximum prices for bulk whiskey prices found by the Administrator to be "in line" with the level of maximum prices prevailing during March 1942, the base period used under the GMPR and MPR 193. Thus when Order 45 was issued the Administrator prescribed as the method of determining respondents'

fore the Administrator and in the court below, respondents contended that Order 45 was not authorized by the regulation or the Act and, if authorized, was in conflict with the United States Constitution (R. 5, 26, 42). The court agreed with the Administrator's contention that Rule 3 established maximum prices for respondents' sales and that Order 45 merely specified in dollars-and-cents what the prices computed under that Rule were (R. 317), but held that, in the absence of applications by the respondents, neither Rule 3 nor the Act itself authorized the issuance of such an Order (R. 318). The court was of the opinion that sellers coming under Rule 3 could elect to file applications for such administrative orders, or not to file and await the determination of their proper dollars-and-cents maximum prices in a possible enforcement suit in a district court (R. 317–319). The court further held that the Act did not authorize Order 45 because that order did not effectuate any of the purposes of the Act. The court found that the only object of Order 45 was to liquidate the damages in the enforcement suit, an issue which, in the court's opinion, the Administrator had already committed to the district court, and that it was not one of the purposes of the Act to authorize the Administrator to decide such an issue.

---

maximum prices reference to the table setting forth the prices already ascertained to have been prevailing during the base period and adjustment of those prices according to the age of respondents' whiskey.

The court then expressed the view that "it is most doubtful" whether the Congress could have authorized the Administrator to issue such an order as Order 45, and stated that (quoting from its opinion in *Royal Lee* v. *Fleming,* decided December 13, 1946, E. C. A., pending on petition for certiorari, No. 875):

> Such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal.

Because the objection that Order 45 usurped the judicial power of the District Court for the Western District of Kentucky had not been raised in the protest proceedings, and in order to clarify the basis for the court's decision, the Administrator petitioned for a rehearing. The petition was denied on January 30, 1947 (R. 340–341). In its opinion on the petition for rehearing the court below, reiterating its position that Order 45 was invalid because it was not authorized by the regulation or the Act, said:

> * * * It is true that we suggested that if the act had authorized such an order as Order No. 45 it might well have been unconstitutional as involving usurpation of judicial power but our conclusion was that Congress had no such purpose in mind in passing the Act. (R. —).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred (a) in construing Rule 3 as giving respondents a choice between filing applications for orders under Rule 3 and awaiting the determination of their maximum prices in dollars-and-cents terms by a district court in a possible enforcement proceeding and therefore (b) in construing Rule 3 as not authorizing Order 45.

2. The court below erred in holding that Order 45 was not authorized by the Act on the ground that it did not effectuate any of its purposes.

3. The court below erred in holding that the determination of respondents' appropriate dollars-and-cents maximum prices was a judicial rather than an administrative function.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the views expressed by the Circuit Courts of Appeal for the Third and Ninth Circuits in the cases of *Porter* v. *Senderowitz,* 158 F. 2d 435 (C. C. A 3), pending on petition for writs of certiorari, *sub nom. Senderowitz* v. *Fleming,* Nos. 677 and 678, and *Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9), pending on petition for a writ of certiorari, *sub nom. Martin* v. *Fleming,* No. 813. In those cases orders similar in character to Order No. 45, issued under identical or indistinguishable regulations, were considered.

In the *Martini* case the regulation involved was identical, and in the *Senderowitz* case the regulation considered was indistinguishable.[7] In both cases the courts expressed the opinion that the orders issued after the suits had been instituted were authorized by the regulations and the Act, and that the issuance of the orders constituted a valid exercise of the Administrator's power. In the case at bar the court below reached a conclusion which is squarely contrary to those reached by the courts in the *Martini* and *Senderowitz* cases, since it held that neither the Act nor the regulation authorized the order. The nature of the conflict is set forth in greater detail in the memoranda filed by the Government in those two cases and need not be repeated here. We submit that resolution of the conflict is sufficiently important to warrant review of the instant case by this Court, irrespective of the question discussed in the Government's memoranda in those cases as to the jurisdiction of the circuit courts of appeals to reach the merits of the problem.

The decision is also in conflict with the principles enunciated in *Addison* v. *Holly Hill Fruit Prod-*

[7] The court below in its opinion on rehearing noted that here the seller had not filed the required application with the Administrator (R. 341), a fact which might serve to differentiate the *Senderowitz* case, although the report there was not filed until after the sales had been made and after an enforcement action had been begun. Even if this difference were material, it would not apply to the *Martini* case since no application was ever submitted by that seller.

ucts Inc., 322 U. S. 607; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; and *El Dorado Oil Works* v. *United States*, 328 U. S. 12. For example, in *Addison* v. *Holly Hill Fruit Products, Inc., supra*, this Court held invalid the definition of "area of production" promulgated by the Administrator of the Wage and Hour Division and remanded the case to the district court with instructions to hold it until a valid definition was promulgated, which was then to be applied retroactively to the determination of the pending lawsuit. The court below attempted to distinguish the case at bar from the *Addison* case on the ground that the definition of "area of production" was a "legislative problem," "the determination of which Congress had expressly delegated to the Administrator of the Wage and Hour Division." Price fixing, however, is equally a "legislative problem," which Congress expressly delegated to the Administrator. Here the administrative agency, exercising broad powers delegated by the Congress, reserved a certain area (Rule 3 determinations) for its own specific action. Thus the case at bar would seem to be no different from the *Addison* case in which the Congress had specifically delegated the solution of a particular problem to an administrative agency. Whether, as an original question, the district court is as competent as is the Administrator to determine the level of maximum prices established by the regulation is of no importance. The deciding factor is that the

function of determining respondents' dollars-and-cents maximum prices, which the Administrator reserved for his own determination, was clearly a part of the legislative process responsibility for which was delegated to him by the Act, and under the decisions of this Court, cited above, it is beyond the province of the courts to determine such matters *de novo*.

2. (a) The holding of the court below that the regulation (Rule 3, i. e., Sections 1420.13 (c) of MPR 193 and 1499.3 (c) of the GMPR, infra, pp. 32, 37) did not authorize the issuance of Order No. 45 is clearly erroneous. The court failed to give effect to the express provision of the Regulation that a seller could transmit the in-line prices into dollars-and-cents terms only by a method prescribed by the Administrator. Its disregard of this provision led it to interpret the Regulation as itself prescribing ceilings under Rule 3 without any need for administrative action. But we think it clear that the Regulation contemplated that a seller would apply to the Administrator for such method before he made sales of the particular commodity.

Obviously, the Administrator, in issuing the Regulation, did not intend that a seller should be permitted to nullify the authority reserved to the Administrator under Rule 3 to specify the method of determining dollars-and-cents prices by wilfully refusing to apply to the Administrator for such a method. In the circumstances, the only reason-

able construction of the Regulation is that it authorizes the issuance of implementing orders at any time in situations where a seller unlawfully fails to make the required application before making sales of the commodity involved. The Administrator's interpretation of his own Regulation to this effect is entitled to great weight. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. To construe the Regulation otherwise would, as held by the Circuit Court of Appeals for the Ninth Circuit in the *Martini* case, *supra*, permit sellers, by a flouting of the regulations, to make it impossible for the prescribed procedure to be followed. Hence, the construction placed by the court below on the Regulation, to the effect that the Regulation did not authorize the issuance of Order No. 45 in the absence of an application by the respondents, is plainly unsound.

(b) The holding below that the Act did not authorize the issuance of Order No. 45, on the ground that the order did not effectuate the purposes of the Act, is also without legal foundation.

Section 2 (a) of the Act, *infra*, pp. 21–24, authorizes the Administrator by regulation or order, to establish such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. The broad, general purpose of the Act, set forth in Section 1 (a) thereof, is to stabilize prices. Section 2 (c) of the Act, *infra*, p. 24, provides that

any regulation or order under Section 2 "may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act." Thus, the Administrator was authorized to devise methods of controlling prices which would be appropriate to particular situations.

In exercising the broad authority conferred upon him by the Act, the Administrator issued the GMPR and MPR 193, which were freeze-type regulations, that is, they did not of themselves specify particular sellers' maximum prices in dollars-and-cents terms. Rules 1 and 2, as we have shown, provided for maximum prices for sellers who had sold the same or a similar commodity during March 1942 or who had close competitors selling such commodities. See pp. 4–5, *supra*. There still remained, however, a number of sellers who did not fall within these categories. Rule 3 provided for this class by establishing as the maximum price in such cases a price "in line" with the "level" of maximum prices otherwise established by the Regulation. Because most industries are characterized by non-uniform pricing practices, the determination of the "level" of prices charged by an industry during a specified period and of a price "in line" with such "level"

733276—47——3

requires the gathering and analysis of statistical data and the exercise of judgment and discretion, a task which Congress delegated to the Administrator.

It was these determinations, therefore, which the Administrator reserved for himself, in order best to effectuate the purposes of the Act. Thus orders like Order 45 were an integral and vital part of the freeze-type price control system established by the GMPR and MPR 193 prior to the time of respondents' sales. Whether such orders effectuated the purposes of the Act must be determined not by reference to the time when they were issued, as the court below fallaciously assumed, but rather by what they did in the context of the whole regulatory scheme. The initial fundamental question is not whether Order 45 by itself, effectuated the purposes of the Act, but whether Rule 3 effectuated these purposes. If Rule 3 did so, and there can be little question that it did, then so did Order 45 because Rule 3 could be effective only if implemented by orders of this character. Whether such an order was issued on application by the seller [8] or on the Administrator's own initiative, or before or after

[8] The court's theory that by not filing an application, respondents elected to have the enforcement court determine their in-line dollars-and-cents maximum prices is refuted by the fact that the reason given by respondents for not filing applications was that they thought their sales of the bulk whiskey were not subject to any price control (18, 29).

institution of an enforcement suit, would seem to be wholly irrelevant to the question of whether the framework of price control envisaged by the freeze-type regulation—which required for its completeness Rule 3 and its implementing orders—effectuated the purposes of the Act.

(c) Although the court in its opinion on the petition for rehearing (R. 341) indicated that its decision was based on other grounds, in its original opinion (R. 319), the court below expressed doubt as to the constitutionality of the Act should it be construed as authorizing the issuance of Order No. 45, on the theory that the Act so construed would authorize an encroachment upon the judicial power and a violation of the due process of law clause of the Fifth Amendment. For the reasons set forth in the Memorandum filed in behalf of the respondent in the *Senderowitz* case, pp. 10–12, we do not believe that orders such as Order No. 45 are violative of any constitutional provisions.

3. The decision of the court below that Order 45 was not authorized either by the applicable Regulation or by Section 2 of the Act gives rise to a question of great importance to the continuing OPA enforcement program which, we respectfully submit, should be reviewed by this Court, particularly since the decision comes from the Emergency Court of Appeals which has exclusive jurisdiction to consider the validity of said orders.

Orders of the type of those issued under Rule 3 play an important part in the effective administration of the Act, and a great many treble-damage actions involving such orders are pending in the district courts. A recent survey indicates that there remain approximately 398 such actions involving over 18 million dollars, of which over 200 involve orders that were issued subsequent to the filing of complaints in district courts under Section 205 (e) of the Act.

Under the doctrine announced by the court below, if sellers fail to comply with the requirements that they first apply to the Administrator, the district courts will be required to find what were the sellers' proper maximum prices in dollars-and-cents terms under regulations containing provisions like Rule 3, even though the regulatory scheme clearly contemplated that such determinations would be made by the Administrator, and were actually made by him. The administrative task of making these determinations has, in the main, long since been completed. To require the Administrator to begin all over again by sending economists and business specialists into numerous district courts throughout the country to offer expert oral testimony in support of the Administrator's burden of proving the sellers' proper dollars-and-cents maximum prices, would impose an onerous burden upon the Administrator's present staff that might well be beyond its capabilities. This would, no doubt,

result in permitting many sellers to escape entirely the consequences of their violation of the law, and, in any event, it would permit defendants in treble-damage cases to gain an advantage from their own wilful omissions.

CONCLUSION

It is, therefore, respectfully submitted that this petition for writs of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

CARL A. AUERBACH,
General Counsel,
Office of Price Administration,
Office of Temporary Controls.

FEBRUARY 1947.

APPENDIX

1. The pertinent provisions of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

> SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary

cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

* * * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are gen-

erally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided,* That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or

both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may pro-

vide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price

schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 201. (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

* * * * *

SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

* * * * *

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceed-

ings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested by enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order,

or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule

is not in accordance with law, or is arbitrary or capricious.

* * * * *

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges whichever is greater if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a

commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

* * * * *

2. (a) Section 1420.13 of Maximum Price Regulation No. 193, as in effect during January 1943 (7 F. R. 6006):

§ 1420.13 *Maximum prices for domestic distilled spirits—(a) Determination of maximum prices generally.*—The seller's maximum price for domestic distilled spirits shall be the seller's maximum price established under § 1499.2 (a) of the General Maximum Price Regulation, plus the following additions:

(1) *Manufacturers may add:*

(i) The difference between the weighted average cost to the manufacturer at his

plant during the period from April 1, 1942 through June 30, 1942 of a quantity of high wines equal to the quantity of high wines used in the manufacture of the domestic distilled spirits to be priced and the weighted average cost to such manufacturer at his plant during the period from January 1, 1942 through March 31, 1942 of the same quantity of neutral spirits: *Provided,* That if the manufacturer increased his price during March 1942, the amount of such increase shall be subtracted from the adjustment permitted hereunder unless the manufacturer files with the Office of Price Administration a statement in affidavit form setting forth facts showing that such increase was not made to offset the increased cost of using high wines: *Provided further,* That the amount of such increase shall be subtracted from the adjustment permitted hereunder regardless of the filing of any such statement if, within 15 days of the receipt thereof, the Price Administrator shall so notify the manufacturer in writing.

(ii) The amount of the tax imposed upon any manufacturer under section 2800 (a) (5) of Title 26 of the U. S. C. A.: *Provided,* That the manufacturer's maximum price for the domestic distilled spirits to be priced established under § 1499.2 (a) of the General Maximum Price Regulation does not reflect payment of such tax.

(iii) The amount of any new tax or any increase in an existing tax imposed upon the manufacturer after March 31, 1942 with respect to the domestic distilled spirits to be priced by any statute of the United States or statute or ordinance of any State

or subdivision thereof: *Provided,* That such amount has been paid directly by the manufacturer.

(2) *Sellers, other than manufacturers, may add:*

(i) The difference between the maximum price established for the seller's supplier under the General Maximum Price Regulation with respect to the domestic distilled spirits to be priced and the maximum price established for the seller's supplier under this Maximum Price Regulation No. 193 with respect to such domestic distilled spirits.

(ii) The amount of any new tax or any increase in an existing tax imposed upon the seller after March 31, 1942, with respect to the domestic distilled spirits to be priced by any statute of the United States or statute or ordinance of any State or subdivision thereof: *Provided,* That such amount has been paid directly by the seller.

In establishing their maximum prices hereunder, sellers at retail may round such prices to the nearest full cent.

(3) *Notification.*—On or before August 16, 1942, every seller, other than sellers at retail, shall notify each of its customers in writing of the difference between such seller's maximum price under the General Maximum Price Regulation and such seller's maximum price under this Maximum Price Regulation No. 193 for each item of domestic distilled spirits ordinarily sold by such seller to such customer.

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.*—If the seller's maximum price for the domestic distilled

spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class.

(c) *Determination of maximum prices under § 1499.3 of the General Maximum Price Regulation.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) or paragraph (b) of this section, the seller's maximum price for such domestic distilled spirits shall be determined in accordance with § 1499.3 of the General Maximum Price Regulation.

(b) Sections 1499.2 and 1499.3 of the General Maximum Price Regulation, as in effect during January 1943 (7 F. R. 5484, 6615, 6794, 7093, 10155):

§ 1499.2 *Maximum prices for commodities and services; general provisions.*—Except as otherwise provided in this regulation, the seller's maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a),

the highest price charged during March 1942 by the "most closely competitive seller of the same class":

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

Highest Price Charged During March 1942

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller during March 1942 shall be:

(a) The highest price which the seller charged for a commodity "delivered" or service "supplied" by him during March 1942 to a "purchaser of the same class"; or

(b) If the seller made no such delivery or supplied no such service during March 1942, his highest offering price for delivery or supply during that month to a purchaser of the same class; or

(c) If the seller made no such delivery or supplied no such service and had no such offering price to a purchaser of the same class, the highest price charged by the seller during March 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers: *Provided, however,* That (1) If before April 1, 1942, the seller raised his prices for a commodity or service to all his classes of purchasers (or to all his classes of purchasers except those to whom he was bound to make delivery or supply during March 1942 pursuant to a firm commitment made before the price rise) and

(2) If during March 1942 he delivered the commodity or supplied the service at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery or supply was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March 1942 shall be deemed to be:

(i) The seller's increased offering price to such class of purchasers for delivery or supply during March 1942, or

(ii) If the seller had no such increased offering price to that particular class of purchasers, the highest price charged during March 1942 to a purchaser of a different class, adjusted to reflect:

(a) The seller's customary differential in price between the two classes of purchasers; or

(b) If the seller had no such customary differential, the actual percentage differential in price between the two classes of purchasers which existed at the time the seller last entered into a commitment, or, if he did not enter into such a commitment, last submitted an offering price, for delivery or supply to a purchaser of that particular class during March 1942.

No seller shall evade any of the provisions of this General Maximum Price Regulation by changing his customary allowances, discounts or other price differentials.

No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any

commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

Similar Commodities or Services

One commodity shall be deemed similar to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed similar to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

Special Provisions

The maximum prices established by this section for certain commodities or services or in certain transactions may be modified by supplementary regulation issued under this section.

§ 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.*—The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this Gen-

eral Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) In the case of a "sale at wholesale or retail" of a commodity, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 2 of this Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his "replacement cost" of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the "appropriate field office of the Office of Price Administration" upon a form, duly filled out, copied from the form contained in Appendix A of this Regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

(b) In the case of a sale other than at wholesale or retail of a commodity, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the Office of Price Administration in Washington, D. C., an application setting forth (1) a description in detail of the commodity for which a maximum price is sought;

and (2) a statement of the facts which differentiate such commodity from other commodities delivered during March, 1942 by such seller and by other competitive sellers of the same class. Such authorization will be given in the form of an order prescribing a method of determining the maximum price for the applicant or for sellers of the commodity generally, including purchasers for resale, or for a class of such sellers.

(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under § 1499.2 or § 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price.

(d) In the case of a sale of a commodity the price for which includes the supply of

a service of substantial value and which cannot be priced under paragraph (a) of this section, or in the case of a sale of a service, the maximum price shall be a price determined by the seller by applying the first applicable pricing method of the pricing methods stated in § 1499.102 of Maximum Price Regulation No. 165, as amended.

(c) Order No. 45, issued June 13, 1945 (10 F. R. 7206):

For the reasons set forth in the opinion issued simultaneously herewith and filed with the Division of the Federal Register, and pursuant to Section 1499.3 (c) of the General Maximum Price Regulation; *It is Ordered:*

(a) (1) The maximum price for sales of bulk domestic whiskey, evidenced by warehouse receipt or otherwise, by the persons named in paragraph (b) hereof, for sales made during the month of January, 1943 (in the event that any such persons made such sales), shall be the maximum price established by that person in accordance with section 1420.13 (a) or (b) of Maximum Price Regulation 193.

(2) In the event that any person named in paragraph (b) hereof is unable to establish a maximum price for his sales of bulk domestic whiskey in accordance with sub-paragraph (1) above, the maximum price for such sales during the month of January, 1943 shall be the appropriate amount set forth in section 1420.13 (g) of Maximum Price Regulation 193 in accordance with the age of the whiskey being priced.

(3) Section 1420.10 (a) (5), (6) and (7) and section 1420.13 (e), (f), (g), (h) and

(i) of Maximum Price Regulation 193, as in effect on February 3, 1943, are incorporated herein by reference.

(b) This order shall apply to all sales of bulk domestic whiskey made during the month of January 1943 by the following persons, in the event that any such persons made such sales:

A. J. Cummins, W. M. Morrison, Louis J. Newman, Earl J. Mock—individually and as officers of the Cummins Distilleries Corporation.

A. J. Cummins, W. M. Morrison, Louis J. Newman, Roy St. Lewis, Hiram Neuwoehner, John W. Smart—individually and as directors of Cummins Distilleries Corporation.

W. M. Morrison, Max Waldman, William Wagner—individually and as the Cummins Stockholders' Distribution Committee.

Morrel D. Klein, and Robert R. Appel—individually and d/b/a Klein and Appel.

John W. Smart, and William Wagner—individually and d/b/a Smart and Wagner.

Allan L. Carter, Jr., C. Prevost Boyce, Henry C. Evans, William T. Childs, C. Newton Kidd, Milton S. Trost, Robert S. Lansburgh, William K. Barclay, Jr., Leroy A. Wilbur, Edward J. Armstrong—individually and d/b/a Stein Bros. and Boyce.

Farmers National Bank of Lebanon, Kentucky, Executor of the estate of George W. Dant.

G. C. Collins, Jr., Christine Hunt Collins, Louis J. Newman, Lillian Newman, W. M. Morrison, Marcella W. Morrison, David J. Williams, T. E. Spragens, J. D. Clark, D. P. Newell, Mrs. Jessie S. Miner, James Burt Miner, Mrs. Anna Bell Bick-

ett, Adolph F. Rupp, Phil E. Lahman, Mrs. Gladys G. Minton, Clara McCoy, John McCoy.

Stanley McCoy, Mary Lee Hiner, Hiram Neuwoehner, Edwin C. Willis, R. J. Haury, A. J. Cummins, Yancey Lee Cummins, Roy St. Lewis, Edward J. Miller, Adolph Hirsch, Russell Ebinger, Adolph H. Gossmahn, Mrs. Marcellus G. Mature.

(c) This order may be revoked or amended by the Price Administrator at any time.

(d) This order shall become effective immediately.

(e) Issued this 13th day of June 1945.

(S) Chester Bowles,
CHESTER BOWLES,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1947

INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1081.

PHILIP B. FLEMING, Temporary Controls Administrator,
Petitioner,

v.

ADOLPH HIRSCH.

On Petition for Writ of Certiorari to the United States Emergency Court of Appeals.

RESPONDENT'S BRIEF IN OPPOSITION.

The Acting Solicitor General, on behalf of Petitioner, has filed a petition for writ of certiorari to review the judgment (R. 328-9) of the United States Emergency Court of Appeals filed in the above entitled case on January 2, 1947.

OPINIONS BELOW.

The original opinion of the United States Emergency Court of Appeals and its opinion on denial of petition for rehearing are not yet reported but appear in the record on pages 310-320 and 340-341.

JURISDICTION.

The jurisdiction of this Court is invoked under section 204(d) of the Emergency Price Control Act of 1942[1] (50 U. S. C. App., Supp. V, section 924(d)), which makes applicable section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED.

Having brought in a United States District Court a treble damage action under section 205(e) of the Act for violation of a maximum price, namely, the March 1942 price charged by the most closely competitive seller, but subsequently being "apparently fearful"[2] of his ability to establish a basis for determining a price by this method, may the Administrator[1] under the Act and consistent with his own regulations issue (over two and one half years after the sales and over two years after instituting the treble damage action) an order establishing a dollars and cents price applicable solely to the defendants in that action and solely to the sales that are the subject matter of that action for the expressed purpose of substituting such price as the basis for the imposition of treble damages in that action?

May the Administrator thus substitute his penalty for the criminal penalty prescribed by the Act where a sale is made for which no applicable ceiling price exists and the seller fails to apply to the Administrator to fix such price?

If such authority is conferred on the Administrator by

---

[1] Hereinafter the following abbreviated designations are used:
"Act" for Emergency Price Control Act (50 U. S. C. App., Supp. V, §§ 901-946);
"GMPR" for the General Maximum Price Regulation;
"MPR" for Maximum Price Regulation;
"OPA" for Office of Price Administration;
"Administrator" for Price Administrator, Office of Price Administration.

[2] The quoted words are those used by the court below (R. 313).

the Act, is the Act pro tanto invalid as being so arbitrary as to be contrary to the due process clause of the Fifth Amendment to the Constitution, or as constituting an ex post facto law contrary to Article I, section 9, clause 3, of the Constitution, or as being an interference with or usurpation of the judicial powers of the courts contrary to Article III of the Constitution.

STATUTE AND REGULATIONS INVOLVED.

Pertinent provisions of the Act and regulations are set forth in the Appendix to this brief.

STATEMENT.

Petitioner's statement omits or fails to give proper emphasis to certain facts believed by Respondent to be essential to the adequate consideration of the petition and fails adequately to set forth Respondent's position. The following restatement is therefore made:

The Administrator, on May 27, 1943, filed a complaint in the United States District Court for the Western District of Kentucky against about 50 of the 400 stockholders of the Cummins Distilleries Corporation, including Respondent (R. 59-76). The action is now pending for trial. It was brought for treble damages under section 205(e) of the Act and the complaint alleged that sales of whiskey warehouse receipts were made on or about January 4, 1943, by either the corporation, its officers, its directors, a stockholders distribution committee, or the individual stockholder defendants, in violation of MPR 193. The maximum prices alleged to be applicable were March 1942 prices charged by Stitzel-Weller Distillery Company and Patrick F. Hackett & Sons, purported to be the most closely competitive sellers of the same class for the same commodity or the similar commodity most nearly like it (R. 72).

An undivided interest in the warehouse receipts sold had been acquired by Respondent and the other stockholders

pursuant to the corporation's liquidation and dissolution (R. 21, 83-86, 95, 154, 175) which was found by The District Court to be in the proper course of business and to involve no sham or lack of good faith. *Louisville Trust Co.* v. *Glenn*, 65 Fed. Supp., 193, 202 (D. C., W. D., Ky.). The sales were actually made by the stockholders distribution committee (R. 258). The Respondent was not, nor had he at any time been, an officer, director or employee of the corporation, or connected with it other than as a stockholder, nor did he have any controlling interest therein (R. 257-8, 270) nor was he a member of the stockholders distribution committee (R. 32). Respondent was not a seller at wholesale or retail of whiskey or warehouse receipts for whiskey (R. 25). The sales were isolated sales consequent upon the liquidation and dissolution.

At the time of the sales in January 1943 MPR 193 was in force. Section 1420.13 of MPR 193 provided three alternative maximum prices designated by Petitioner as "Rule 1," "Rule 2," and "Rule 3," namely, (1) seller's March 1942 price—admittedly here inapplicable; (2) the March 1942 price charged by the most closely competitive seller,—the price alleged in the treble damage suit to have been violated and (3) a price in line with the level of maximum prices established by the GMPR *to be determined by the seller following application* to the Administrator under subsection (c) of section 1499.3, GMPR, and authorization from him.

On May 26, 1945, about 2-½ years after the sales were made and completed and about two years after the institution of the treble damage action, the Assistant General Counsel, OPA, wrote Respondent that "doubt or uncertainty" existed with respect to which of the pricing provisions of MPR 193 was applicable to the sales (R. 28) and in effect invited Respondent to make application at that late date for the establishment of a maximum price. No application was made (R. 28-29).

Thereupon on June 13, 1945, over two and a half years after the sales and two years after suit was brought the Administrator issued Order 45. Order 45 prescribes a dollars and cents price. It is a price applicable solely to sales made during the month of January 1943 by approximately 50 persons named in the order. These persons are the defendants in the pending treble damage action and the January sales are the subject matter of that suit. Order 45 has only a retroactive effect, no prospective effect.

Order 45 states on its face that it is issued pursuant to section 1499.3(c), GMPR. This GMPR subsection provides that a seller, in case of a sale at wholesale or retail, is authorized to make application in stated form for a maximum price to be determined by him after an authorization from the Office of Price Administration in the form of an order issued following the application and prescribing a method of determining the maximum price.

The Administrator's Opinion accompanying Order 45, after referring to the pending litigation in the District Court, states that the issues whether the persons named in the Order did in fact make any sale, and whether the sales are governed by the prices of the most closely competitive sellers "have been tendered in the litigation and should appropriately be determined by the District Court." The Opinion then proceeds—

> "The accompanying order will be applicable only in the event that the District Court . . . finds that maximum prices for sales by such persons, or any of them, could not be established under section 1420.13(a) or (b) of Maximum Price Regulation 193" (R. 187).

In other words the Administrator states that if the price alleged in his complaint does not apply, then the District Court shall apply the dollars and cents price of Order 45. The Administrator's position appears to be that the District Court under section 204(d) of the Act must apply the Order without giving consideration to its validity.

MPR 193, section 1420.13, prescribed two ceilings applicable to commodities, and provided a method by which a third ceiling could be determined. Since Respondent made no sales in March 1942, and Petitioner apparently doubts that any sales were made by his most closely competitive seller, no ceilings applicable to these sales existed in January 1943. Assuming the regulation was applicable to Respondent with respect to these sales, it became the duty of Respondent, before making a sale, to apply to the Administrator to issue "*an order prescribing a method of determining the maximum price.*" GMPR, section 1499.3(c). Respondent's offense, if any, was not that he made a sale in excess of a prescribed ceiling price, but that he made a sale without having first applied to the Administrator to issue an order prescribing a method of determining an applicable ceiling price. For that offense the Act prescribes a criminal penalty and no treble damage action can be maintained, since there is no ceiling price against which to measure the excess. The Administrator has not chosen to invoke the criminal penalty, nor to rely upon his ability to prove his charge that the sales were in excess of prices at which the most closely competitive seller had made sales, but, rather seeks, after the sales are made, to create and impose his own penalty.

On January 11, 1946, Respondent filed a protest with the Administrator against Order 45 (R. 19). The protest was denied (R. 146). Complaint was filed with the United States Emergency Court of Appeals (R. 254). That court adjudged Order 45 invalid from the date of its issuance (R. 328-9). The court stated that the GMPR, section 1499.3(c), did not authorize a retroactive price order of the character of Order 45 and that Order 45 was not authorized by section 2 of the Act, since the only purpose of Order 45 was to liquidate the damages in a pending suit between the Administrator and certain sellers, including Respondent (R. 318-19, 341). The court also said that if the Act had authorized such an order as Order 45, then the Act might well

be unconstitutional as involving usurpation of judicial power (R. 319, 341).

The court did not give Respondent a choice between filing an application or having the District Court determine a dollars and cents ceiling, as stated in Petitioner's brief (pp. 8, 10). The effect of the decision is that the District Court is to apply whatever price was prescribed by regulations in effect at the time of the sale and that the Administrator may not substitute his own penalty for the Congressional penalty for failure to file application.

ARGUMENT.

1. The Circuit Courts of Appeal Decisions are not in Conflict.

The decision of the United States Emergency Court of Appeals is not "in conflict with the decision of another circuit court of appeals on the same matter." Petitioner's brief (p. 10) states that the decision below is in conflict with the "views" expressed by (not, it should be noted, the decisions of) the Circuit Courts of Appeal for the Third and Ninth Circuits in the cases of *Porter* v. *Senderowitz,* 158 F. 2d, 435 (C.C.A. 3rd, 1946), pending on petition for writ of certiorari *sub nom. Senderowitz* v. *Fleming,* Nos. 677 and 678, and *Martini* v. *Porter,* 157 F. 2d 35 (C.C.A. 9th, 1946), pending on petition for writ of certiorari *sub nom. Martini* v. *Fleming,* No. 813. "Views" do not constitute a decision. By "views" Petitioner is referring to certain dicta as to the validity of the Administrator's orders there involved. Since those cases were appeals in treble damage suits, brought under section 205(e) of the Act, the Circuit Courts of Appeal, as a consequence of the prohibitions in section 204(d) of the Act, had no jurisdiction or power to consider the validity of any regulation, order, or price schedule of the Administrator. Thus in the Senderowitz case the Court stated: "A determination of the validity of a regulation [is] something which neither the District Court nor we are

given authority to pass upon." In the Martini case, the Court pointed out that it could not (i.e., had no jurisdiction or power to) condemn the retroactive character of the order in that case and so had to regard it as a mere and proper adjunct to GMPR section 1499.3(c).

The only case of which counsel are aware, in which a circuit court of appeals has decided a related point (instead of expressing "views" thereon) is *Porter* v. *The Sherwood Distilling Company,* 156 F. 2d, 264 (C.C.A. 4th, 1946) and that case is not in conflict with the decision below. There, as here, the Administrator sought to induce the filing by the seller of a belated application to the Administrator for the establishment of a maximum price for sales made many months earlier. In the Sherwood Distilling Company case the Administrator sought this result by suit for a mandatory injunction compelling the filing of an application. In the present case, Respondent having failed to make application in response to the OPA's letter of May 26, 1945, the Administrator sought to accomplish the equivalent result by issuing an order just as though a timely application had been made.

In the *Sherwood Distilling Company* case the Circuit Court of Appeals denied the injunction and stated that "A present application by the defendant for the establishment of a price for the sale of goods already made will not be a compliance with the regulation which requires an application to be made before the sales take place" (id., p. 269). The Court then went on to point out that the defendant could have been subjected to an injunction or other order under section 205(a) of the Act during the period of its violations and could have been indicted or punished by fine or imprisonment under section 205(b) of the Act for failure to file application (id., p. 269).[1]

---

[1] The Administrator had not in the Sherwood Distilling Company case issued any retroactive order but was seeking to compel an application from the seller which would afford the basis for the issuance of such an order. However, the Administrator stated

2. No Important Question of Federal Law is Presented.

Petitioner's brief states that 398 actions, based on 200 orders issued subsequent to filing of complaints in district courts under section 205(e) of the Act and involving over 18 million dollars, are pending. The fact that there are 395 other pending actions similar to Nos. 1080, 1081, and 1082, involving around eleven million dollars in addition to the approximately seven million dollars claimed in Nos. 1080, 1081, and 1082, or that the Administrator may have exceeded his power in issuing the 199 other orders, does not make the question here presented an important question of Federal law which has not been, but should be, settled by this Court. It would not be important if there were one 18 million dollar case instead of 398 cases totaling that amount. It is no more important by reason of the fact that there are several suits, rather than one suit.

Order 45 never had any prospective operation, but was solely retroactive. MPR 193 is no longer in effect and there is no longer price regulation of alcoholic beverages. Effective November 10, 1946, all commodities except sugar, syrups, and rice were exempt from price control (OPA Supplemental Order 193, 11 F. R. 13464). On the previous day the President stated that—

> "The general control over prices and wages is justifiable only so long as it is an effective instrument

---

that he did intend to issue a retroactive order later. On rehearing the Circuit Court of Appeals said that in the event the Price Administrator did thereafter issue such an order he could move in the District Court to file a supplemental pleading and if the District Court granted the motion the Court could order the seller to plead thereto but "the supplemental pleading shall be subject to all defenses which the Distilling Company may desire to raise" (id., p. 270-1). The opinion on rehearing in no wise indicates that a retroactive price order, if eventually issued by the Administrator, would be the lawful way to proceed instead (as the Court pointed out in the original opinion) of proceeding by way of the remedies that Congress had provided for failure to file an application.

> against inflation. I am convinced that the time has come when these controls can serve no useful purpose. I am, indeed, convinced that their further continuance would do the nation's economy more harm than good. Accordingly, I have directed the immediate abandonment of all control over . . . prices except that necessary to implement the rationing and allocation programs of sugar and rice. Rent control, however, must and will be continued.
>
> . . . . .
>
> "There is no virtue in control for control's sake. When it becomes apparent that controls are not furthering the purposes of the stabilization laws but would, on the contrary, tend to defeat these purposes, it becomes the duty of the Government to drop the controls."—Extract from White House Press Release entitled "Statement of the President," dated November 9, 1946.

It is obvious that the settling of the question presented by this case is of no importance to the future enforcement of the Act, which itself terminates June 30, 1947, nor to the prevention of inflation which is the general purpose of the Act. Winding up OPA litigation is not a matter of national importance, nor are the questions presented in connection therewith questions of such importance as to require settlement by decision of this Court.

3. The Lower Court Decision is not in Conflict with Applicable Decisions of this Court.

This Court has not held that the Act authorizes issuance of retroactive orders of such character as Order 45. An executive officer is bound by his own regulations that have the force and effect of law and retroactive changes in them are not valid unless ratified by Congress. *Arizona Grocery Co.* v. *Atchison T. and S. F. R. Co.*, 284 U. S. 370 (1932), and *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

This Court has repeatedly stated that Acts of Congress are not to be construed to operate retroactively, nor to authorize issuance of retroactive regulations or orders,

unless such legislative intent unequivocally appears. *Miller* v. *United States*, 294 U. S. 435, 439 (1935); *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, 323 U. S. 141, 164 (1944). This Court has also repeatedly decided that it is the duty of the courts to construe a statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but so as to avoid grave doubts on that score. *Screws* v. *United States*, 325 U. S. 91, 98 (1945); *Ex parte Endo*, 323 U. S. 283, 299-300 (1944); *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 40 (1933); *United States* v. *La Franca*, 282 U. S. 568, 574 (1931); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77, 82 (1932); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937).

If the Act were construed to authorize Order 45, then under decisions of this Court, the Act would be so arbitrary as to be lacking in due process contrary to the Fifth Amendment to the Constitution. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 258 U. S. 338 (1922); *Untermeyer* v. *Anderson*, 276 U. S. 440 (1928); *Nichols v. Coolidge*, 274 U. S. 531 (1927). Also since the treble damages imposed by section 205(e) of the Act clearly fall within the classification of a penalty (*Bowles* v. *Farmers National Bank of Lebanon, Ky.*, 147 F. 2d, 425, 428 (C.C.A. 6th, 1945), the Act, if construed to authorize Order 45, would constitute an ex post facto law contrary to Article I, section 9, clause 3, of the Constitution. *Cummings* v. *Missouri*, 4 Wall. 277 (1867), dealing with an ex post facto law as well as bill of attainder. Finally, if the Act were held to authorize Order 45, the Act would be authorizing an interference with or usurpation of judicial power by the Administrator through prescribing a rule for decision of a pending cause in a particular way.[1] *United*

[1] Contrary to the statement in Petitioner's brief (p. 9), this objection was raised by Respondent in his protest (R. 20), argued at length before the Administrator's Board of Review (R. 338),

States v. *Klein*, 13 Wall. 128 (1872). Such an interference or usurpation would be contrary to Article III of the Constitution which places the judicial power exclusively in the courts and no part of it in the Administrator.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

FREDERIC P. LEE,
Munsey Building,
Washington 4, D. C.

J. VERSER CONNER,
Kentucky Home Life
Building,
Louisville 2, Kentucky.

Attorneys for Respondent.

March 1947.

---

renewed in Respondents' complaint (R. 257), argued at length in Respondent's brief before the lower court, and referred to in oral argument before that court by Respondent's counsel and recognized by that court and by counsel for the Administrator as having been raised (R. 332-3, 336-7, 338-9).

APPENDIX.

A. Pertinent Provisions of the Emergency Price Control Act.

(50 U. S. C., App., Supp. V, § 901 et seq.)

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. . . .

* * * * * * * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such

classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. . . .

Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Sec. 204. . . . (d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

* * * * * * * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precau-

tions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. . . .

B. Pertinent Provisions of Maximum Price Regulation No. 193, as in Effect During January 1943 (7 F. R. 6006).

Sec. 1420.13 Maximum prices for domestic distilled spirits—

* * * * * * * * * *

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class.

(c) *Determination of maximum prices under § 1499.3 of the General Maximum Price Regulation.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) or paragraph (b) of this section, the seller's maximum price for such domestic distilled spirits shall be determined in accordance with § 1499.3 of the General Maximum Price Regulation.

C. Pertinent Provisions of the General Maximum Price Regulation as in Effect During January 1943 (7. F. R. 3153, 7093).

Sec. 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.*—The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

* * * * * * * * * *

(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or comodities cannot be priced under § 1499.2 or § 1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price.

D. Order No. 45, Issued June 13, 1945 (10 F. R. 7206).

OFFICE OF PRICE ADMINISTRATION.

[GMPR, Section 1499.3(c), Order No. 45]

Authorization of Maximum Prices A. J. Cummins et al.

For the reasons set forth in the opinion issued simultaneously herewith and filed with the Division of the Federal Register, and pursuant to Section 1499.3(c) of the General Maximum Price Regulation, *It is ordered:*

(a) (1) The maximum price for sales of bulk domestic whiskey, evidenced by warehouse receipt or otherwise, by the persons named in paragraph (b) hereof, for sales made during the month of January, 1943 (in the event that any such persons made such sales), shall be the maximum price established by that person in accordance with section 1420.13(a) or (b) of Maximum Price Regulation 193.

(2) In the event that any person named in paragraph (b) hereof is unable to establish a maximum price for his sales of bulk domestic whiskey in accordance with sub-paragraph (1) above, the maximum price for such sales during the month of January, 1943 shall be the appropriate amount set forth in section 1420.13 (g) of Maximum Price Regulation 193 in accordance with the age of the whiskey being priced.

(3) Section 1420.10(a)(5), (6) and (7) and section 1420.13(e), (f), (g), (h) and (i) of Maximum Price Regulation 193, as in effect on February 3, 1943, are incorporated herein by reference.

(b) This order shall apply to all sales of bulk domestic whiskey made during the month of January, 1943, by the following persons, in the event that any such persons made such sales:

A. J. Cummins, W. M. Morrison, Louis J. Newman, Earl J. Mock, individually and as officers of the Cummins Distilleries Corporation.

A. J. Cummins, W. M. Morrison, Louis J. Newman, Roy St. Lewis, Hiram Neuwoehner, John W. Smart, individually and as directors of Cummins Distilleries Corporation.

W. M. Morrison, Max Waldman, William Wagner, individually and as the Cummins Stockholders' Distribution Committee.

Morrel D. Klein, and Robert R. Appel, individually and d/b/a Klein and Appel.

John W. Smart, and William Wagner, individually and d/b/a Smart and Wagner.

Allan L. Carter, Jr., C. Prevost Boyce, Henry C. Evans, William T. Childs, C. Newton Kidd, Milton S. Trost, Robert S. Lansburg, William K. Barclay, Jr., Leroy A. Wilbur, Edward J. Armstrong, individually and d/b/a Stein Bros. and Boyce.

Farmers National Bank of Lebanon, Kentucky, Executor of the estate of George W. Dant.

G. C. Collins, Jr., Christine Hunt Collins, Louis J. Newman, Lillian Newman, W. M. Morrison, Marcella W. Morrison, David J. Williams, T. E. Spragens, J. D. Clark, D. P. Newell, Mrs. Jessie S. Miner, James Burt Miner, Mrs. Anna Bell Bickett, Adolph F. Rupp, Phil E. Lahman, Mrs. Gladys G. Minton, Clara McCoy, John McCoy, Stanley McCoy, Mary Lee Hiner, Hiram Neuwoehner, Edwin C. Willis, R. J. Haury, A. J. Cummins, Yancey Lee Cummins, Roy St. Lewis, Edward J. Miller, Adolph Hirsch, Russell Ebinger, Adolph H. Gossmahn, Mrs. Marcellus G. Mature.

(c) This order may be revoked or amended by the Price Administrator at any time.

(d) This order shall become effective immediately.

(e) Issued this 13th day of June, 1945.

[S] Chester Bowles
CHESTER BOWLES,
Administrator.

E. Opinion Accompanying Order No. 45—Under Section 1499.3 (c) of the General Maximum Price Regulation (R. 186).

There is now pending and undetermined in the United States District Court for the Western District of Kentucky an action entitled *Chester Bowles, Price Administrator, Office of Price Administration, Plaintiff, against Cummins Distilleries Corporation,* the persons named in paragraph (b) of the accompanying order and others, defendants. The Price Administrator claims in said action that Cummins

Distilleries Corporation or in the alternative, the persons named in the accompanying order or some of them, sold bulk whiskey, evidenced by warehouse receipts or otherwise, at prices in excess of the maximum prices for sales of such commodities established by applicable regulations of the Office of Price Administration. The Price Administrator also claims in the said action that some or all of the persons named in the accompanying order were required to establish their maximum prices for sales of bulk domestic whiskey by reference to their most closely competitive sellers. Some of the defendants, however, deny that there was any most closely competitive seller on the basis of whose sales maximum prices could be established. If that should be found to be the case, then the sellers would have been required to establish their maximum prices by application under Section 1420.13(c) of Maximum Price Regulation 193. However, none of the persons named in said order has applied for the establishment of a maximum price under that section.

The accompanying order is not based on any finding that the persons named therein did, in fact, make any sale, or that the sales involved in the litigation are not governed by the prices of the most closely competitive sellers. These issues have been tendered in the litigation and should appropriately be determined by the District Court.

The accompanying order will be applicable only in the event that the District Court finds that the persons named in that order, or any of them, were the sellers of the bulk whiskey involved in the litigation, and in the event that the District Court also finds that maximum prices for sales by such persons, or any of them, could not be established under Section 1420.13(a) or (b) of Maximum Price Regulation 193.

The maximum prices established by the accompanying order generally reflect the highest prices prevailing in March 1942 for bulk domestic whiskey and make appropriate allowance for storage and carrying charges. In the opinion of the Price Administrator, those prices are generally fair and equitable in their application to all types of domestic whiskey.

Issued this 13th day of June, 1945.

[S] Chester Bowles
CHESTER BOWLES,
Administrator.